BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the complaint by Patricia Musty dated July 21, 1995 and addendum dated November 27, 1995, alleging discrimination and harassment with respect to employment on the basis of sex and reprisal.

B E T W E E N :

Ontario Human Rights Commission

- and -

Patricia Musty

Complainant

- and -

Meridian Magnesium Products Limited
Ed Waters, Paul Walker, Ron Doan and Willi Kammerer

Respondents

- and -

Attorney General for Ontario

Intervener

INTERIM DECISION

Adjudicator : Mary Anne McKellar

Date : February 13, 1998

Board File No: BI-0140-97

Decision No : 98-002-I

Board of Inquiry (*Human Rights Code*)
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APPEARANCES

Ontario Human Rights Commission	)	Roger Palacio, Counsel
Patricia Musty, Complainant	)	Harry Kopyto, Legal Agent
Meridian Magnesium Products Limited, Corporate Respondent Ed Waters, Personal Respondent Paul Walker, Personal Respondent Ron Doan, Personal Respondent Willi Kammerer, Personal Respondent	)	Barbara Humphrey, Counsel
Attorney General for Ontario, Intervener	)	Jennifer August, Counsel

INTRODUCTION

Pursuant to s. 35(6) of the *Human Rights Code*, R.S.O. 1990, c. H-19, as amended ("the *Code*"), I was assigned to hear the complaints of Patricia Musty ("the Complainant") that, contrary to the *Code*, Meridian Magnesium Products Limited, Ed Waters, Paul Walker, Ron Doan and Willi Kammerer ("the Respondents") discriminated against her in her employment on the basis of sex ("the Original Complaint"), and subsequently took reprisal action against her in respect of her raising the Original Complaint ("the Reprisal Complaint"). The Respondents have conceded that the Original Complaint discloses a contravention of the *Code*, for which an award of $10,000.00 in respect of damages for mental distress is appropriate.

The Complainant has served and filed a Notice of Constitutional Question on the parties to this proceeding and on the Attorneys General for Canada and Ontario. The constitutional question raised by the Complainant is whether s. 41(1)(b) of the *Code*, which imposes a cap of $10,000.00 on the amount the Board of Inquiry ("the BOI") can award in respect of damages for mental anguish, is inconsistent with s. 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11 ("the *Charter*").

THE ISSUE & THE PARTIES' POSITIONS

The issue before me is whether the BOI has jurisdiction to entertain the Constitutional Question posed by the Complainant. The moving parties, the Ontario Human Rights Commission ("the OHRC") and the Respondents, take the position that the BOI does not have jurisdiction. They are supported in this position by the intervener, the Attorney General for Ontario. The Complainant takes the position that the BOI does have jurisdiction to consider the Constitutional Question.

THE DECISION

The following decision was communicated by the Deputy Registrar, Tribunals' Office, to the parties by facsimile transmission on February 10, 1998 and again on February 11, 1998:

While the Board of Inquiry does have jurisdiction to entertain the Constitutional Question, the Ontario Court (General Division) is a more appropriate forum for its resolution. In my discretion, I am staying the hearing on the Constitutional Question to permit the Complainant to proceed before the more appropriate forum.

The hearings scheduled for February 11, 1998 and February 27, 1998 are hereby adjourned.

Should the Complainant decide to make application to the Ontario Court (General Division) with respect to the Constitutional Question, she is directed to advise the Board of Inquiry and the other parties of her decision within thirty days of the release of the Board's reasons on these jurisdictional motions.

All of the parties (excluding the intervener) are directed to identify in writing to the Board by February 27, 1998, those issues with respect to the Original Complaint that remain outstanding and require adjudication by the Board.

Written reasons for this decision will follow.

THE REASONS

1. The Jurisprudence

The moving parties and the Attorney General submit that the recent decision of the Supreme Court of Canada in *Cooper v Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 is determinative of the issue before me. In *Cooper*, a majority of the Court held that neither the Canadian Human Rights Commission nor the Canadian Human Rights Tribunal possessed the jurisdiction to consider the constitutional validity of s. 15(c) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, as amended.

Prior to rendering its decision in *Cooper*, the Supreme Court of Canada in three previous judgments specifically dealt with the issue of the jurisdiction of administrative boards and tribunals to interpret and apply the *Charter*, and, in particular, to refuse to apply those provisions of their enabling statutes which they found to be inconsistent with the *Charter*. The earlier decisions are: *Douglas/Kwantlen Faculty Association v. Douglas College,* [1990] 3 S.C.R. 570; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board),* [1991] 2 S.C.R. 5; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission),* [1991] 2 S.C.R. 22. Because the majority in *Cooper* purports to apply the above decisions, some examination of them is necessary in order to assess the parameters of the *Cooper* analysis.

Douglas/Kwantlen

In *Douglas/Kwantlen* the Court considered whether an arbitrator under a collective agreement had the jurisdiction to determine whether a provision of that collective agreement contravened s.15(1) of the *Charter*. A panel of seven justices sat. Although Wilson, J. and L'Heureux-Dubé, J., disagreed with their five colleagues on another point, all seven justices agreed that the arbitrator did have such jurisdiction:

> The question here is whether an arbitrator in deciding a grievance under a collective agreement may apply the *Charter* and grant the relief sought for its breach. I have no doubt that he can. The arbitrator is under s. 98 of the *Labour Code*, *supra*, expressly granted authority "to provide a final and conclusive settlement of a dispute arising under a collective agreement" (emphasis added), and it gives a wide range of appropriate remedies for that purpose. In accomplishing his task, the arbitrator is empowered by s. 98(g) to interpret and apply any Act intended to regulate employment. . . . I cannot accept the college's contention that the interpretation and application of the *Charter* is vastly different from the application of ordinary statutes for which arbitrators are responsible. For example, there is little difference in certain provisions of the Human Rights Codes which arbitrators may hold to override provisions in collective agreements. (per La Forest, J., at p. 596)

La Forest, J. then concluded at p. 597, "*A fortiori*, I think, there cannot be a Constitution for arbitrators and another for the courts." He went on in his reasons to articulate why, as a practical matter, it made sense for arbitrators to deal with the *Charter*.

Although *Douglas/Kwantlen* does not deal with a tribunal's jurisdiction to scrutinize the constitutional validity of its enabling statute, it does deal with the analogous situation: the jurisdiction of an arbitrator to scrutinize the constitutional validity of the instrument pursuant to which he derives his authority to adjudicate.

Cuddy Chicks

Cuddy Chicks was heard by a full panel of the Court. It involved the Court's consideration of the jurisdiction of the Ontario Labour Relations Board ("OLRB") to entertain a challenge to the

constitutional validity of a provision in its enabling statute. The issue arose in the context of a trade union's application for certification as the exclusive bargaining agent for a group of workers whom the OLRB found to be agricultural workers. Under the *Labour Relations Act*, certifications may only be granted in respect of bargaining units of "employees", which term was defined to exclude agricultural workers. The constitutional issue was whether the exclusion of agricultural workers from the ambit of "employees" contravened the *Charter*. The OLRB held that it had jurisdiction to determine this constitutional issue. Once again, all nine justices agreed that the OLRB had such jurisdiction.

La Forest, J. wrote the majority decision. He commenced his analysis by citing *Douglas/Kwantlen* for

> . . . the basic principle that an administrative tribunal which has been conferred the power to interpret law holds a concomitant power to determine whether that law is constitutionally valid" (at p. 13)

After observing that tribunals possess only the powers conferred upon them by statute, La Forest J. noted that authority to apply the *Charter* must be found in the tribunal's enabling statute. In the case of the OLRB, he wrote:

> The legislature expressly, and without reservation, conferred authority on the Board to decide points of law. (at p. 15)

La Forest, J. went on to set out why, as a practical matter, it made sense for the OLRB to deal in the first instance with issues respecting the constitutional validity of its enabling statute.

In their concurring reasons, Wilson, J. and L'Heureux-Dubé, J. agreed that the OLRB had jurisdiction to deal with the *Charter* issue, but did not view its jurisdiction to do so as being necessarily grounded in its enabling statute:

> The absence of legislative authority to deal with the *Charter* issue in the governing statute is not, in my view, necessarily determinative of a tribunal's jurisdiction, since the authority and obligation to apply the law may be grounded elsewhere . . . (per Wilson, J., at p. 20)

The jurisdictional issue involved in *Tétreault-Gadoury* was whether a Board of Referees under the *Unemployment Insurance Act* had the jurisdiction to apply the *Charter* and decline to apply the provision in its enabling statute that precluded the receipt of ordinary unemployment insurance benefits by persons 65 years of age or older. The statutory scheme here is worth noting: applicants for benefits whose claims are denied by the Commission have a right of appeal to a Board of Referees. From the Board of Referees' decision there is a right of appeal to an Umpire, appointed from the panel of judges of the Federal Court.

All nine justices agreed that the Board of Referees did not have jurisdiction to apply the *Charter* and scrutinize the constitutional validity of the disentitling provision of the *Unemployment Insurance Act*. La Forest, J. wrote the reasons for eight of them. He commenced his analysis by citing the proposition that emerged from *Douglas/Kwantlen* and *Cuddy Chicks*:

> In both these cases, the Court held that an administrative body, which by virtue of its legislative mandate has expressly been given the power to interpret or apply any law necessary to reaching its findings, has the power to apply the *Charter* to determine that a particular provision of an Act is without force or effect. I do not propose to repeat the analysis that led to this conclusion here. (at p. 31)

La Forest, J. then went on to identify the issue before the Court as whether a tribunal without the express power to consider all relevant law could apply the *Charter*. He began by examining the mandate the legislature gave to the Board of Referees. He noted that, although the Board of Referees is not given the express power to determine all questions of law, the Umpire is. Although he stressed that the *expressio unius est exclusio alterius* maxim of statutory interpretation should be applied with caution, he nevertheless concluded that the difference in wording between the statutory mandate of the Board and that of the Umpire made it

> . . . unlikely . . . that the failure to provide the Board of Referees with a power similar to that given to the umpire was merely a legislative oversight (at p. 33)

In looking at the practical considerations, La Forest, J. did not disagree with the Federal Court of Appeal's conclusion that the Board of Referees was capable of dealing with the *Charter* issue, however, he found that that ability or competence did not cloak the Board with jurisdiction:

> . . . notwithstanding the practical capabilities of the Board of Referees, the particular scheme set up by the legislature . . . contemplates that the constitutional question should more appropriately have been presented to the umpire, on appeal, rather than to the Board itself. (at p. 35)

L'Heureux-Dubé concurred in the result, but would have left open the issue of the circumstance in which jurisdiction to decide questions of law including constitutional issues might be found to have been conferred on a tribunal.

Weber

The agent for the Complainant referred to *Weber v. Ontario Hydro,* [1995] 2 S.C.R. 929, but none of the parties presented any arguments with respect to it. Although *Weber* does not involve a *Charter* challenge to enabling legislation, I nevertheless think the decision is worth considering to the extent that it illustrates the Court's approach to the application of the principles emerging from the three decisions discussed above.

The *Weber* facts are complicated, and not relevant for the purposes of this decision. Suffice it to say that one of the issues the Court addressed was whether a labour arbitrator under a collective agreement has jurisdiction to award damages to remedy a breach of the *Charter*, in this case the right to be secure from unreasonable search or seizure.

Weber was heard by seven justices. Iacobucci, J., writing for himself and two others, acknowledged that arbitrators are bound to apply the law and the *Charter*, and must not apply provisions that they find to be in violation of the *Charter*, but he distinguished that situation from one in which an arbitrator purports to provide a remedy for the *Charter* violation. An arbitrator is not a "court of competent jurisdiction" under s. 24(1) of the *Charter*, and may not provide a remedy for its breach

absent express jurisdiction to do so. After concluding that the accepted meaning of "court" does not include arbitrators, Iacobucci, J. rejected the notion that he should interpret the term more expansively. His rejection was premised on several considerations:

> It is the characteristics of a "court" : the rules of procedure and evidence, the independence and legal training of its judges, the possibility of hearing from a third party intervener such as an Attorney General or an *amicus curiae*, which make it the most suitable forum to hear a s. 24(1) application. (at p. 942)

Earlier, he mentioned another reason why "court" in s. 24(1) ought to be construed narrowly to exclude tribunals:

> Courts must decide cases according to the law and are bound by *stare decisis*. By contrast, tribunals are not so constrained. . . . In labour arbitration, the arbitrator is not bound to follow the decisions of other arbitrators, even when similar circumstances arise. . . . In the area of *Charter* adjudication, it is quite important to ensure a relatively constant application and interpretation of *Charter* rights and remedies. As the *Charter* forms part of the supreme law of the country, it is in keeping with its status to have *Charter* claims decided by a system of adjudication that tries to be relatively uniform (both in the interpretation of *Charter* rights and *Charter* remedies), that is to say, by the courts of justice. (at pp. 940-41)

In addition, Iacobucci, J. found that tribunals, even if they could be considered "courts", did not possess "competent jurisdiction" to award the remedy sought here under s. 24(1): damages in tort for breach of *Charter* rights:

> In the case at bar, it is completely within the power of the arbitrator to decide that the actions of the employer in this case violated s. 8 of the *Charter*. It can decide on this basis that where the *Charter* has been violated, this is evidence that can assist the tribunal in concluding that the collective agreement has also been violated. However, deciding that the employer has violated s. 8 of the *Charter* does not open the door to the arbitrator awarding a remedy for the s. 8 violation itself. (at p. 948)

By contrast, the majority of the Court, in reasons written by L'Heureux-Dubé, J., cited *Douglas/Kwantlen* in support of the practical reasons why tribunals ought to deal with constitutional issues, and further found that as the arbitrator had been given the power to award damages, that power enabled him to award damages in respect of a *Charter* breach, should he find one.

Cooper

Cooper arose out of a complaint to the Canadian Human Rights Commission ("the Commission") by two airline pilots who were compelled by the terms of their collective agreement to retire at age 60. Section 15(c) of the *Canadian Human Rights Act* ("the *Act*") provides that mandatory retirement at an age that is standard in an industry does not violate the *Act*'s general prohibition on discrimination on the basis of age. The complainants wished to argue that s. 15(c) of the *Act* contravened s. 15(1) of the *Charter*. The Commission, which is responsible for receiving, investigating and attempting to settle complaints, as well as deciding whether to refer them on to the Tribunal for adjudication, declined to refer it, for the reason that the Supreme Court of Canada in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 had already determined that mandatory retirement provisions do not contravene the *Charter*. A curious feature of *Cooper* is that the parties did not argue that the Commission or the Tribunal were without jurisdiction to consider the constitutional validity of s. 15(c) of the *Act*, so the Court itself appointed an *amicus curiae* to argue against such jurisdiction (see p. 880, per La Forest, J.).

Cooper was heard by a seven-member panel of the Court. Two of them found that the Commission and Tribunal had jurisdiction to scrutinize the constitutional validity of s. 15(c) of the *Act*. Their decision was written by McLachlin, J. Five of them found that those bodies did not have jurisdiction. Four of the five justices agreed on the reasons for their determination, which reasons were written by La Forest, J. Chief Justice Lamer concurred in their decision, but issued his own reasons.

Lamer, C.J.C., expressly disapproved of the Court's previous decisions in *Douglas/Kwantlen*, *Cuddy Chicks* and *Tétreault-Gadoury*, which he articulated as supporting the following proposition:

> . . . that tribunals which have jurisdiction over the general law, have jurisdiction to refuse to apply -- and hence effectively to render inoperative -- laws that they find

> unconstitutional, since through the operation of s. 52 of the *Constitution Act, 1982*, the Constitution is the supreme law of Canada. (at p. 866)

La Forest, J., for the majority, accepts the above proposition and purports to apply *Douglas/Kwantlen*, *Cuddy Chicks* and *Tétreault-Gadoury*:

> . . . the essential question facing a court is one of statutory interpretation -- has the legislature, in this case Parliament, granted the administrative tribunal through its enabling statute the power to determine questions of law? (at p. 887)

He then picks up on his own suggestion in *Tétreault-Gadoury* (at p. 33, quoted above) that where a failure to expressly confer jurisdiction is an "oversight" , other circumstances may lead to the implying of jurisdiction:

> There is no doubt that the power to consider questions of law can be bestowed on an administrative tribunal either explicitly or implicitly by the legislature. (at p. 888)

Since nothing in the *Act* expressly conferred jurisdiction on the Commission to deal with general questions of law, La Forest, J. turned to an examination of whether such jurisdiction could be implied. In so doing, he considered several "practical matters" as providing insight into the mandate given to the tribunal by the legislature: the composition and structure of the tribunal; the procedure before it; the appeal route from it, and its expertise (at p. 888). This list of "practical matters" derives from those considered by the Court when it concluded in *Douglas/Kwantlen* and *Cuddy Chicks* that it made good sense for the tribunals involved in those cases to have jurisdiction to scrutinize the constitutional validity of their enabling instruments. After setting out the scheme of the *Act*, La Forest J. characterized the role of the Commission as being " is to deal with the intake of complaints and to screen them for proper disposition." (at p. 890). Of particular importance to the majority reasons was the fact that the Commission is not an adjudicative body:

> It is not the job of the Commission to determine if the complaint is made out. Rather its duty is to decide if, under the provisions of the Act, an inquiry is warranted having regard to all the facts. The central component of the Commission's role, then, is that of assessing the sufficiency of the evidence before it. . . . The striking down of s. 15(c) by the Commission, which is what a referral to a tribunal in the present case would amount to, would be an assumption by the Commission of an adjudicative role for which it has no mandate. (at p. 891)

Because the Commission is not an adjudicative body, La Forest doubted that it was a proper forum for the consideration of constitutional issues, noting that it required "paper hearings" only, and was not bound by the traditional rules of evidence, but could receive "unsworn evidence, hearsay evidence, and simple opinion evidence" (at p. 894). La Forest noted that the Commission's screening process might become bogged down if parties were permitted to raise constitutional issues before it. Finally, he made some comments with respect to the expertise of the Commission to deal with questions of law, noting that they possess neither the recognized expertise of the Federal Court judges who act as Umpires under the *Unemployment Insurance Act*, nor of the persons who sit as arbitrators or on labour boards:

> Similarly in both *Douglas/Kwantlen* and in *Cuddy Chicks*, *supra*, the expertise of labour boards and the assistance they could bring to bear on the resolution of constitutional issues was recognized. In contrast this Court has made clear in *Mossop*, *supra*, at pp. 584-85, and reiterated in *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571, at pp. 599-600, that a human rights tribunal, unlike a labour arbitrator or labour board, has no special expertise with respect to questions of law. What is true of a tribunal is even more true of the Commission which, as noted in *Mossop*, is lacking the adjudicative role of a tribunal. (at p. 895)

Having determined that the Commission lacked the jurisdiction to consider the constitutional validity of its enabling statute, the majority necessarily concluded that the Tribunal also lacked such jurisdiction:

> Given my finding that the Commission does not have the jurisdiction to question the constitutional validity of its enabling statute, it logically follows that a tribunal appointed under the Act, and indeed a review tribunal appointed pursuant to s. 56, must also lack the jurisdiction to declare unconstitutional a limiting provision of the Act. Take for example the case presently before us: if the Commission must apply the Act as it is written, then the appellants cannot get their complaint before a tribunal, depending as it does on s. 15(c) being found to be inoperative. The same is true of any complaint that requires the Commission to arrive at a decision on a constitutional matter before being able to find that the complaint warrants further inquiry by a tribunal. It would be something of a paradox for Parliament to grant tribunals under the Act a jurisdiction that could never be exercised. (at pp. 895-96)

The French language version of the above passage makes it clear that what La Forest, J. is saying is that the tribunal's jurisdiction depends upon it obtaining a valid referral from the Commission. No such valid referral can be obtained where the Commission has itself no jurisdiction to refer:

> Prénons l'exemple de la présente espèce: si la Commission doit appliquer la Loi telle qu'elle est énoncée, la plainte des appelants ne pourra être déférée à un tribunal, puisqu'il faudrait pour cela que l'al. 15c) soit déclaré inopérant.

La Forest, J. goes on to consider the statutory mandate given to the Tribunal with respect to general questions of law. He notes that it has not been given any explicit power to deal with such questions, and characterizes its activity as primarily fact-finding in nature. He then adds:

> In the course of such an inquiry a tribunal may indeed consider questions of law . . . unlike the Commission, it is implicit in the scheme of the Act that a tribunal possess a more general power to deal with questions of law. Thus tribunals have been recognized as having jurisdiction to interpret statutes other than the Act (see *Canada (Attorney General) v. Druken*, [1989] 2 F.C. 24 (C.A.)) and as having jurisdiction to consider constitutional questions **other than those noted above**. In particular, it is well accepted that **a tribunal has the power to address** questions on the constitutional division of powers (*Public Service Alliance of Canada v. Qu'Appelle Indian Residential Council* (1986), 7 C.H.R.R. D/3600 (C.H.R.T.)), on **the validity of a ground of discrimination under the Act** (*Nealy v. Johnston* (1989), 10 C.H.R.R. D/64050 (C.H.R.T.)), and it is foreseeable that a tribunal could entertain Charter arguments on the constitutionality of available remedies in a particular case. (see *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892). (at p.896, emphases added)

The first problem with applying this passage stems from the difficulty of ascertaining what is meant by the phrase "constitutional questions other than those noted above". Presumably it refers to something noted in the paragraph preceding it in La Forest, J.'s reasons, which I have quoted in full above. Does it refer to constitutional questions that seek to have declared unconstitutional "a limiting provision of the Act", or does it refer to constitutional questions the referral of which to the tribunal is premised on a previous finding of unconstitutionality by the Commission? Some insight into this issue may be gleaned from a brief examination of the case cited by La Forest, J. for the proposition that the Tribunal has the power to address the constitutional validity of a ground of discrimination under the Act: *Nealy v. Johnston*.

Counsel for the Attorney General provided a copy of *Nealy,* at my request, to all of the parties before me, although none of them made any submissions with respect to it. The *Nealy* facts may be stated briefly. Several individuals complained to the Commission that certain persons were communicating messages via telephone that tended to incite hatred against particular groups, contrary to s. 13(1) of the *Act*. The Commission referred the matter to a Tribunal, which found that the behaviour complained of had been engaged in by the persons identified, and that that behaviour did tend to incite hatred contrary to the *Act*. The respondents argued that s. 13(1) of the *Act* should not be applied because it contravened the guarantees of freedom of expression contained in s. 2(b) of the *Charter*. The Tribunal found that s. 13(1) did contravene s. 2(b) of the *Charter*, but that it was a justifiable limit on that freedom under s. 1. The same conclusion was reached by the Supreme Court of Canada in *Taylor*, where an issue was whether the Tribunal's "cease and desist" order prohibiting speech contravened s. 2(b) of the *Charter*.

Nealy thus involved a situation where a respondent before the Tribunal attempted to use the *Charter* defensively as a shield to render acceptable behaviour that would otherwise violate human rights legislation. By contrast, *Cooper* involved a situation where the complainant wanted to use the *Charter* offensively as a sword to render what would otherwise be acceptable behaviour a contravention of human rights legislation. In either case, the Tribunal is being requested to examine the constitutional validity of a provision of its enabling legislation. The only difference is that the first referral is one that the Commission can validly make, because it does not have to make a *Charter* determination in order for the matter to come to the Tribunal.

The closing remarks of La Forest, J. with respect to the Tribunal's jurisdiction are not reflective of the subtleties of his actual analysis:

> . . . while a tribunal may have jurisdiction to consider general legal and constitutional questions, logic demands that it has no ability to question the constitutional validity of a limiting provision of the Act. (at pp. 897-98)

Instead, La Forest, J.'s approving reference to *Nealy* strongly suggests that the ratio of the majority decision in *Cooper* is that the Tribunal had no jurisdiction to consider the constitutional validity of s. 15(c) of the *Act* because the issue could not validly be referred to it by the Commission.

2. Does the BOI have jurisdiction to entertain the Constitutional Question?

Does Cooper compel a finding that the BOI is without jurisdiction?

The moving parties urged me to find that *Cooper* stands for the proposition that the BOI lacks the jurisdiction to apply the *Charter* to question the constitutional validity of a provision in the *Code*. Although that is the view of *Cooper* taken in *Krznaric v. Chevrette* (unreported, November 13, 1997, Ont. Ct. (Gen. Div.) Pardu, J), I have indicated above why I think it misrepresents the actual ratio of La Forest, J's reasons. There was no challenge taken before me with respect to the OHRC's jurisdiction to refer the Original Complaint, nor with the BOI's jurisdiction generally to award damages in respect of mental distress. Therefore, I do not find that I am compelled by *Cooper* to find that the BOI is without jurisdiction to entertain the Constitutional Question.

What is the BOI's statutory mandate?

My determination that *Cooper* does not dictate the result in this case, however, does not relieve me of the obligation of determining whether, on the basis of the jurisprudence discussed, the BOI has jurisdiction to entertain the Constitutional Question posed by the Complainant. Having regard to the whole of that Supreme Court of Canada jurisprudence, I find that the following propositions emerge with respect to the jurisdiction of boards and tribunals to scrutinize the constitutional validity of their enabling legislation:

- tribunals have no inherent jurisdiction to consider *Charter* issues;

- their jurisdiction with respect to the *Charter* is, as is the case with their jurisdiction generally, to be determined by having regard to their enabling legislation;

- jurisdiction to deal with general issues of law, including issues of *Charter* interpretation and application, may be conferred either explicitly or implicitly;

- in determining whether such jurisdiction has been implicitly conferred, regard may be had to: the nature and composition of the tribunal; its composition; its expertise; and the appeal route from it;

- the more "adjudicative" or "court-like" a tribunal, the more likely that its jurisdiction will be found to extend to general questions of law;

- in cases where it is difficult to determine whether a tribunal has implicitly been given jurisdiction to apply the *Charter*, "practical considerations" may influence the outcome, for example, volume of cases; fairness, efficiency and accessibility concerns; the likelihood of resort to the courts in any event;

- the issue of a tribunal's jurisdiction to apply the *Charter* and disregard those provisions of its enabling statute that are offensive to it is distinct from the issue of a tribunal's jurisdiction to award a remedy for a breach of the *Charter*;

- even where a tribunal may be sufficiently adjudicative to be able to deal with general questions of law, including the *Charter*, it cannot do so where the other prerequisites to its having jurisdiction have not been satisfied, i.e. a valid referral from another body has not occurred.

How do these factors affect the case before me? Put another way, is the BOI more like the Commission in *Cooper*, or the OLRB in *Cuddy Chicks*? The BOI derives its jurisdiction from the *Code*. The *Code*, unlike the *Labour Relations Act* provisions under consideration in *Cuddy Chicks*, does not expressly confer on the BOI the authority to decide "all questions of fact and law". Nevertheless, I am of the view that such power must be implied.

First of all, I note that the *Code* contains a provision providing for its paramountcy over other statutes that are inconsistent with it (see s. 47(2)), in contrast to the *Act* under consideration in *Cooper*, which contains no express paramountcy provision. The body that examines the provisions, scope and application of those other statues to determine whether or not they are inconsistent with the *Code* is the BOI. Indeed, s. 19(1) and s. 25(2) of the *Code* expressly contemplate the consideration of the

provisions of the *Education Act* and *Constitution Act, 1867*, and *Employment Standards Act*, respectively.

Secondly, I note that the appeal provisions of the *Code* provide that an appeal to the Divisional Court from the decision of the BOI may be made on "questions of law or fact or both . .", which necessarily implies that the BOI has the jurisdiction to deal with the questions of "law" that may form the ground of the appeal. Section 39(4) of the *Code*, requiring the BOI to disclose to the parties any independent legal advice it receives so that they "may make submissions as to the law" also indicates the legislature's intention that the BOI deal with questions of law.

Thirdly, the "adjudicative" or "court-like" nature of the BOI and the proceedings before it, support the implication that it has the jurisdiction to decide general questions of law, including those of *Charter* application. Although not bound by strict rules of evidence or the *Civil Rules of Practice*, the BOI has nevertheless, pursuant to statutory authority, promulgated its own *Rules of Practice*, and is in addition, bound by the provisions of the *Statutory Powers Procedure Act*. As a result, BOI proceedings are characterized by an exchange of pleadings; by mandatory pre-hearing documentary disclosure; by the adduction of *viva voce* testimony under affirmation; and by examination and cross-examination of witnesses. The *Code* itself, in several sections, suggests that the BOI and the courts engage in similar functions when dealing with issues arising under it: "the Commission, the board of inquiry or a court shall not find . ." (see sections 11(2), 17(2) and 24(2)); or "The Commission, the board of inquiry or a court shall consider. . ." (see sections 17(3) and 24(3)). The BOI is also, unlike the Tribunal, not constrained to adjudicate in accordance with guidelines promulgated by the Commission (*Act*.s.27(2)). All of the above indicate that the BOI is more court-like than the Commission or the Tribunal under consideration in *Cooper*.

The perceived expertise of the BOI is difficult to assess. Again, is it more like the OLRB or the federal human rights Commission? Unlike the OLRB, BOI decisions are not protected by a privative clause, but are instead subject to appeal, without leave, on questions of fact or law. This may suggest a presumption of less expertise on the part of BOI panel members than on the part of the OLRB Vice-Chairs. On the other hand, if what is being measured is expertise to apply the *Charter*, it would be remiss not to note that the issues that arise with respect to the application of s.15(1) are, as the *Douglas/Kwantlen* court pointed out, largely the same as the issues that arise for determination under

human rights legislation such as the *Code*. BOI panel members may sit in panels, or may sit singly. The same is now largely true of the OLRB, although such was not the case at the time *Cuddy Chicks* was decided, where the Court referred favourably to the tri-partite nature of the OLRB. Unlike the Umpires in *Tétreault-Gadoury*, all of whom were Federal Court Judges, neither BOI nor OLRB Vice-Chairs are judges. There is also no requirement that they possess the necessary qualifications to practice law, although, in the case of both the OLRB and the BOI this is true of almost all their presiding officers.

In addition to suggesting that I follow *Cooper,* the moving parties suggested that I apply it, to the same effect: a finding that the BOI is without jurisdiction to entertain the Complainant's Constitutional Question. Instead of comparing the BOI to the OLRB, they compared it to the Commission and Tribunal: *Cooper* applies because the statutory schema of the *Act* and the *Code* are similar. It is true that in each case the commission receives and investigates complaints and causes the appointment of adjudicators to hear and decide the cases that they cannot resolve. However, the same could be said of human rights legislation across most Canadian jurisdictions, and yet an examination of the various pieces of enabling legislation reveals significant differences in the provisions dealing with precisely those areas the Supreme Court has subjected to scrutiny in its decisions, including *Cooper*. In some jurisdictions, the adjudicators are given express jurisdiction to deal with questions of law (see Manitoba, *Human Rights Code*, S.M. 1987-88, c. 45, CCSM H175, s. 42; Nova Scotia, *Human Rights Act*, R.S.N.S. 1989, c. 214,. s 34(7)). In some, their decisions are final and binding (Manitoba, s.49; New Brunswick, *Human Rights Code*, S.N.B. 1973, c. H-11s. 21) and may be enforced as orders of the court. Others are subject to appeal on law or fact without leave (Canada, *Act*, s. 56(3); Ontario, *Code*, s. 42(3)); others on the same grounds, but only with leave (Newfoundland, *Human Rights Code*, R.S.Nfld. 1990, c. H-14, s. 31(2); Quebec, *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12, s. 132); and still others may only be appealed on questions of law (Nova Scotia, s. 36(1); Saskatchewan, *Saskatchewan Human Rights Code*, S.S. 1979, c. S-21, s. 32(1); Yukon, *Human Rights Act*, S.Y. 1987, c.3, s. 26(3)). The one tribunal that is composed exclusively of judges has neither the express jurisdiction to deal with questions of law, nor does it enjoy the protection of a privative clause or limited grounds of appeal, although an appeal may only be made with leave. This comparison compels a cautious approach to following *Cooper* or citing it for the bald proposition that human rights adjudicative tribunals lack the jurisdiction to apply the *Charter*.

The comparison of human rights legislation reveals a practical reason for applying *Cooper* cautiously. On the Court's own analysis in *Cooper*, some human rights adjudicative tribunals clearly have express jurisdiction to decide questions of law and apply the *Charter*. Others, without such express jurisdiction, could clearly have it implied, because the adjudicators in question are judges, or perhaps because the appeal route from their decisions indicates that considerable deference should be paid to their decisions. Although the statutory schema are broadly similar overall, the statutory interpretation exercise as a test of jurisdiction to apply the *Charter* creates the real risk of unequal access to *Charter* litigation across the country, and also creates an incentive for frequent preliminary challenges to a board of inquiry's jurisdiction to apply the *Charter*.

In addition to looking at the nature of the decision maker and its powers, I think it is useful to examine the nature of the impugned provision of the enabling statute. The issue before me is whether the BOI can consider the constitutional validity of a section of the *Code* that expressly limits its jurisdiction to award damages in respect of mental distress to amounts not exceeding $10,000.00. This provision can be analogized to that under consideration by the OLRB in *Cuddy Chicks*. The OLRB could certify employees, but not agricultural workers, unless that prohibition was contrary to the *Charter*. The BOI can award damages in mental distress, but not in an amount exceeding $10,000.00, unless that prohibition is contrary to the *Charter*. On this analysis, it appears that the BOI and the OLRB are being asked to do the same thing.

3. Should the BOI determine the Constitutional Question?

I find that the BOI has jurisdiction to consider the constitutional validity of a provision of its enabling statute. For the reasons that follow, however, I determine in my discretion that the Constitutional Question in this case should be deferred to the courts. It is beyond doubt that the court has concurrent jurisdiction over this matter. A proceeding commenced in one forum may be stayed where the matter is more appropriately dealt with in another forum with concurrent jurisdiction (*Mahar v. Rogers Cablesystems Ltd.* 1995, 25 O.R. (3d) 690 (General Division)). *Mahar* involves consideration of a situation where both the court and the Canadian Radio-television and Telecommunications Commission ("the CRTC") had concurrent jurisdiction. The court deferred to the CRTC. Although the court expressed reluctance to permit jurisdiction to be divided as between the courts and the

tribunal, and relied to some extent on the degree of curial deference afforded to the CRTC's decisions, *Mahar* did not involve a question relating to constitutional validity of the CRTC's enabling statute, an issue on which the CRTC would not be entitled to deference. In *Mahar*, the court considered whether the issues raised in the proceeding went to the heart of the CRTC's specialized expertise, and which forum increased the likelihood of a uniformly applicable decision being rendered. Applying these tests to the circumstances of this case, the more appropriate forum for determining the Constitutional Question is the Ontario Court (General Division).

Does the Constitutional Question go to the heart of the BOI's expertise?

In *Cuddy Chicks*, and in *Nealy*, the tribunals were required to interpret and apply the challenged provisions in order to determine whether they offended the *Charter*. They had to determine first whether the impugned provisions were even called into question on the facts of their cases, and only then to determine the impact of those provisions on *Charter* rights. The distinction between those situations and this one is striking. The BOI is not being asked to interpret the *Code* at all: there is no drawing on the BOI's particular expertise where the simple challenge is to the monetary limit placed on its jurisdiction to award damages in respect of mental anguish. The OLRB would have been well placed on the s. 15(1) challenge in *Cuddy Chicks* to determine whether agricultural workers were similarly situated to other workers who were employees under the legislation, because it routinely deals with the circumstances of the latter. Here, all complainants under the *Code* are subject to the same restrictions in respect of the availability of mental anguish damages. The group of persons to which the Complainant claims to be similarly situated in her s. 15(1) challenge must therefore be broader than complainants under the *Code*, and may possibly include civil litigants generally. The BOI does not generally deal with civil litigants, and is not so well placed to consider their circumstances as a court would be.

While the BOI's expertise would be called upon in assessing the mental anguish damages actually suffered by the Complainant, that inquiry has not yet taken place. In part, it has not occurred because the parties rejected my suggestion that consideration of the *Charter* issues, including the jurisdictional issue, be deferred until after it had been determined whether the Complainant's mental anguish damages exceeded $10,000.00. The Complainant did not wish to defer consideration of the Constitutional Question because of her concern that I would be influenced in my assessment of

damages by BOI jurisprudence, all of which of course deals with such assessments as constrained by the statutory limit. The Respondents did not wish to deal with damages first, because that would involve several days of hearing, which they could avoid if successful on their challenge to the BOI's jurisdiction to entertain the Constitutional Question. These positions suggest that this is not the type of case in which the BOI proceeding could reasonably be anticipated to result in the compilation of any evidentiary record that might be of use to a reviewing court. The BOI's expertise in assessing the damages occasioned by contraventions of the *Code* is not engaged at all in the course of determining the constitutional validity of the impugned section. Instead, it comes into play only **after** such validity has been determined, and on the facts of this case where the Respondents have already indicated a willingness to pay the statutory maximum, only where the provision is found to be invalid. If the court determines the issue of constitutional validity in the first instance, and determines that the provision is invalid, the issue of the assessment of damages, the one issue within the BOI's expertise, can be remitted to it.

Which forum is more likely to finally resolve the Constitutional Question in a way that is uniformly applicable to all similar cases?

In deciding whether to defer, *Mahar* suggests that it is appropriate to consider which forum is better placed to finally resolve an issue on a uniformly applicable basis. This factor weighs heavily in favour of my staying the hearing with respect to the Constitutional Question. Because the constitutional challenge relates to a remedial section of the *Code*, all complainants are potentially affected. In *Cuddy Chicks*, only agricultural workers were affected. In *Tétreault-Gadoury*, only persons employed after the age of 65 were affected. In *Douglas/Kwantlen*, only persons employed pursuant to a particular collective agreement were affected. Since s. 41(1)(b) applies to the adjudication of all complaints under the *Code*, the appropriate remedy for the Constitutional Question is a declaration of invalidity, which the BOI is without jurisdiction to make. The Complainant does not seek a declaration of invalidity from the BOI. Instead, she seeks to have the $10,000.00 cap not applied to the Original Complaint. My fear is that every complainant before the BOI will seek the same thing. They will all be aware that one BOI decision is not binding on another panel, and so each will seek to have addressed a similar constitutional question. In these circumstances, it is preferable, as Iacobucci, J., noted in *Weber* (at pp. 940-41) to have the Constitutional Question decided by the court.

In deciding whether to exercise my discretion and defer to the court on the Constitutional Question, I have considered the likelihood that my decision will be reviewed there in any event. While I do not accept the proposition that judicial review proceedings are inevitable when a tribunal makes a decision with respect to the constitutional validity of its enabling statute, I do think that such proceedings are more likely than not to occur in this case. This is the first BOI decision in Ontario to consider the impact of *Cooper*. On my reading of *Cooper*, the case does not stand for the broad proposition for which the parties before me cited it or for which the court in *Krznaric v. Chevrette* cited it, even though that broadly-stated proposition appears in portions of La Forest, J.'s majority reasons. In these circumstances, were I to exercise the BOI's jurisdiction to entertain the Constitutional Question, it would not be surprising if that proceeding became the subject of an immediate judicial review application, or of an appeal at some later date. The very real likelihood that this matter will end up in the courts at some point is a factor favouring deferring to the court now.

Additional Considerations

The Complainant strongly urged that I consider issues of accessibility in determining whether the BOI has jurisdiction to entertain the Constitutional Question. The argument was that proceedings before tribunals are relatively inexpensive, and parties do not necessarily require legal representation, all of which makes them an accessible forum in which the less privileged members of society may challenge the laws that create or maintain the relative privilege of others. All of this is true. In the circumstances of this case, however, I am reluctant to consider only the cost to the Complainant of requiring the Constitutional Question to be determined in court. In addition, I am mindful of the cost to the Respondents of permitting the issue to be dealt with by the BOI. The Respondents have already conceded liability to the maximum amount of damages under the *Code*. If the Constitutional Question is determined by the BOI, several days of hearing will be required even before the issue of the actual assessment of damages is addressed. In fact, the Complainant's agent advised at the last day of hearing that he is aware of several potential interveners. The determination of whether they should be permitted to intervene, and on what basis, would be resolved on a preliminary basis, and would itself require at least a day of hearing. Because the ultimate issue before the BOI on the Original Complaint is the amount of damages assessed against the Respondents, their interests are directly affected by whatever happens at any stage of the BOI proceeding. By contrast, if the

Constitutional Question were determined by the court, the Respondents could choose not to participate in that proceeding, or to play a more constrained role, for the simple reason that the immediate outcome of the court proceeding would not be an award of damages against the Respondents. In the circumstances of this case, the fairness and accessibility interests of the parties also favour deferring to the court.

Dated at Toronto this 12th day of February, 1998

Mary Anne McKellar, Vice-Chair